

**115th Session**

**Judgment No. 3217**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. S. against the International Organization for Migration (IOM) on 17 December 2010 and corrected on 24 March 2011, IOM's reply of 7 June, the complainant's rejoinder of 13 August, and the Organization's surrejoinder of 21 September, corrected on 27 September 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Azerbaijani national born in 1972, worked for IOM in his home country from 1999 to 2007 as a National Programme Officer. He joined IOM again in July 2008 as Project Officer for IOM activities in Bosaso, Somalia, under a six-month Special Short Term contract (SST). His contract was renewed for the period 15 January to 30 July 2009 and his title changed to Head of Sub-Office-IOM Bosaso/Project Officer.

In March 2009 an e-mail was sent from Headquarters to Mr E. N., the IOM Regional Representative for East and Central Africa, with a

number of IOM officials in copy, enquiring as to the circumstances in which the complainant had been re-employed by IOM in July 2008 and, in particular, whether references had been checked. The Regional Representative answered positively, pointing out that, out of three reference checks, “extremely positive feedback” had been received from two of the complainant’s former supervisors in Azerbaijan. The complainant’s appointment was further extended in July 2009 for the period 1 August 2009 to 31 January 2010 and changed to a Special Fixed Term contract (SFT).

In November 2009 the complainant underwent surgery. He submitted medical certificates covering his sick leave for the period 16 November 2009 to 26 February 2010 in mid-January 2010.

Meanwhile, on 6 January he received a letter dated 4 January 2010 informing him of the various formalities related to his separation from service, which was to take place on 31 January upon the expiry of his contract. On 11 January he met with the Regional Representative to discuss, among other things, his separation. The latter informed him that the main reason for his separation was the completion of the AENEAS/CBMM project which funded his contract.

During February 2010 the complainant’s contract was extended on two occasions to cover his sick leave. On 28 February the Director of Human Resources Management (HRM) informed the complainant that mediation would be organised between him and the Regional Representative, as the complainant did not believe that the main reason for his separation was lack of funds. By letter dated 1 March he was informed that his contract would be extended until 31 March 2010. A further letter dated 5 March 2010 from the Director of HRM indicated that his contract would not be renewed thereafter due to budgetary constraints. On 22 March the mediator issued her final report, stating that she was unable to schedule a mediation session between the parties due to their differing expectations of the mediation.

On 19 April 2010 the complainant submitted a request for review of the decision not to renew his contract. In an e-mail of 20 April the

Director of HRM maintained the decision and confirmed that the reason for the non-renewal of his contract was the completion of the project which funded his contract.

On 18 May the complainant lodged an appeal with the Joint Administrative Review Board (JARB). On 31 May he was offered a six-month contract with retroactive effect for the period 1 April to 30 September 2010 on the same terms as his previous contract, but conditional on the offer constituting full and final settlement of any claim he might have arising out of his employment with IOM. He rejected the offer and made a counterproposal, which the Administration rejected by an e-mail of 1 June 2010, stating that this was the final decision on his case. It also indicated that if he wished to challenge that decision, he would not be required to submit a request for review. Instead, he would be granted an extension of the deadline to enable him to amend his appeal submitted on 18 May 2010. On 21 June the complainant submitted his amended appeal to the Board.

The Director General accepted the JARB's recommendation to dismiss his appeal as unfounded on 17 December 2010. That same day, the complainant filed a complaint with the Tribunal, in which he impugns the implied decision to reject his internal appeal.

B. The complainant attributes the non-renewal of his contract to bias and to a campaign of defamation against him. He asserts that this campaign was initiated by the "defamatory message" sent from Headquarters to the Regional Representative, amongst others, in March 2009. According to him, there was no objective reason for terminating his contract, as funds were available for Somalia and no reduction in staff had been envisaged. He points out that he had been promoted to the position of Head of Sub-Office in January 2009 and was therefore responsible for all projects in the area and not only the project to which he was initially assigned. He therefore contends that the non-renewal of his contract was a disguised disciplinary measure and a violation of due process.

In addition, he asserts that IOM failed in its duty of care towards him, since his working conditions while in Bosaso were "not up to the

standards of other UN Organizations” and affected his health. Moreover, he was informed of his separation from service when he was on sick leave and was not given sufficient notice, nor was he informed of the reason for the non-renewal of his contract.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement, and he claims payment of full benefits from the date of his termination until his reinstatement, compensation for moral damages and costs. He also requests official apologies from IOM, an investigation into relevant members of the Administration regarding the defamatory message and appropriate disciplinary measures against those involved in the campaign of defamation against him.

C. In its reply IOM submits that the non-renewal of the complainant’s contract was based exclusively on the completion of the project for which he had been employed and the consequent budgetary constraints. It notes that the complainant has based his whole case on the message sent from Headquarters to the Regional Representative in March 2009. However, that message had no impact on the decision not to renew his contract. Indeed, the JARB examined this issue in detail and found that there was no relation between the message sent in March 2009 and the non-renewal of his contract in March 2010, given that his contract was renewed in July 2009 for six months and that there had been no follow-up on the issue after the Regional Representative’s conclusive reply.

The Organization points out that neither the Staff Regulations and Staff Rules for Officials nor the complainant’s contract set a notice period for the non-renewal of his contract and it contends that he was given reasonable notice in accordance with the Tribunal’s case law. It acknowledges that the documentation received by the complainant on 6 January did not state the reason for non-renewal. However, on 11 January 2010 he met with the Regional Representative, who confirmed that the reason was the end of the project to which the complainant was assigned and the consequent lack of funding. It emphasises that the JARB reviewed the funding situation and found

that there were no other projects that could have covered the complainant's position and that genuine efforts had been made to meet the complainant's expectations. Moreover, the Organization offered him a six-month contract, on 31 May 2010, on the same terms and conditions as his previous contract, but he rejected it.

Lastly, IOM denies that it neglected the complainant's health situation and insists that he was not officially on sick leave when he received his separation documents as he had not yet submitted the corresponding medical certificates. Once it was established that his ongoing absence was medically certified, his contract was extended on three further occasions, and when his sick leave ended his contract was renewed for one month with notice of its non-renewal upon its expiry on 31 March 2010. The Organization points out that his various claims of "serious deterioration of health" due to his work at IOM were first raised after he had received his separation documents and that they were not reported to the Occupational Health Unit.

D. In his rejoinder the complainant states that it has been confirmed to him by a former colleague that the decision not to renew his contract was originally based on the findings of an internal audit of IOM's Office in Baku, Azerbaijan, conducted in December 2006 when he was serving there, and that it was this that prompted the defamatory e-mail sent by a former colleague in March 2009. He points out that that former colleague commenced as Chief of Mission, IOM Sudan in October 2009 and that, just one month later, the Regional Representative requested his separation from service. The complainant asserts that it was only after the Administration realised that it could not rely on the audit report, which had never been shared with him, without committing a serious breach of due process, that it decided to invoke budgetary constraints as the reason for terminating his employment. He disputes the Organization's statement that there were no further communications on this issue following the Regional Representative's reply. He also asserts that while he was still the Head of the Sub-Office, IOM Bosaso, the Regional Representative gave instructions to speed up the process for the selection of a new Head of Sub-Office, which confirms the availability of funds and the

continuing need for his position. Lastly, he reiterates that IOM was fully aware that he was on sick leave at the time he was notified of his separation.

E. In its surrejoinder IOM maintains its position in full. It submits that the complainant's allegation that the decision not to renew his contract was based on the 2006 audit report is misguided, as Headquarters only became aware of that decision after he had received the notice of non-renewal in January 2010.

#### CONSIDERATIONS

1. The complainant challenges the non-renewal of his contract with IOM in early 2010. He was then working on the AENEAS/CBMM Project. At the time he was first notified his contract would not be renewed (by letter dated 4 January 2010) the complainant was on a Special Fixed Term contract. His employment on a contract of that character was the result of a change to the nature of the contract on 1 August 2009 together with the extension of the contract for a further six months (thus nominally expiring 31 January 2010).

2. The letter of 4 January 2010 did not give a reason for the non-renewal and spoke in terms of separation from service "to take place on 31 January 2010". Two extensions of the contract occurred in February 2010 due to the complainant being on sick leave. By letter dated 1 March 2010 the contract was extended for the period 1 March to 31 March 2010. A further separation letter dated 5 March 2010 indicated that the contract would be extended until 31 March 2010 but would not be renewed "due to budgetary constraints".

3. On 19 April 2010 the complainant wrote to Mr E. N., IOM's Regional Representative for East and Central Africa, saying: "[I] request you to review your decision which will allow me to continue my successful work in Somalia." In a response dated 20 April 2010

the Director of HRM indicated IOM was adhering to its decision, saying: “I am now able to confirm that the reason for the non-renewal of your contract was the completion of the [AENEAS]-CBMM programme that was funding your contract.”

4. On 18 May 2010 the complainant lodged an appeal with the Joint Administrative Review Board (JARB). Subsequent attempts to resolve the matter were unsuccessful and an amended appeal was submitted by the complainant on 21 June 2010. The complainant filed the present complaint with the Tribunal on 17 December 2010 on the basis that more than 120 days had elapsed since his appeal had been filed (see Article 17, Annex D to IOM’s Staff Regulations and Staff Rules). As it turns out, on the same day (17 December 2010) the Director General accepted the recommendation of the JARB, contained in a memorandum of 14 December 2010, to dismiss the complainant’s appeal. He informed the complainant of this decision by a letter dated 21 January 2011. Although this decision is not challenged by the complainant in his rejoinder, the Tribunal finds it convenient, in accordance with its case law, to consider the complaint by reference to the express decision of 21 January 2011 (see Judgments 2786, under 3, and 3161, under 2).

5. The preceding discussion is a broad outline of events leading to the complainant’s claim in this Tribunal. At the heart of his case is the argument that the reason given (the conclusion of funding for the project the complainant had been engaged on) was not the real reason and the termination of his contract was a disguised disciplinary measure in violation of due process. Central to that argument is the proposition that the real reason arose from a “defamatory message” about the complainant from a former colleague circulated within IOM in March 2009, the fact that the former colleague commenced as Chief of Mission in Sudan in October 2009 and one month later the Regional Representative requested the complainant’s separation. Allied to this argument was alleged reliance by IOM on an audit report of December 2006 that adverted to concerns about the complainant’s performance. Also central to that argument that the

given reason was not the real reason, was the proposition that funding was available for the complainant to continue his work in Somalia.

6. These arguments were considered and rejected by the JARB. The complainant did not have the benefit of the JARB's report when he formulated his arguments in his brief. However, he did when he formulated his rejoinder. But his rejoinder involved, on the question of funding, mainly a verbatim repetition of what he has said in his initial brief. What the complainant did not do was engage in a discussion and rebut, at least in any convincing way, the material provided to the JARB by IOM that the Board summarised in its report. That material left little room to doubt that the funding of the project on which the complainant was engaged was intended to conclude on 31 January 2010 though, because IOM had received a second no-cost extension (confirmed in February 2010), it had been able to offer the complainant a six-month extension (offered on 31 May 2010) which the complainant rejected.

7. As to the argument that the March 2009 communication somehow laid the foundation for what occurred in early 2010, the JARB analysed the complainant's contention and rejected it. Its reasons for doing so are compelling. The March 2009 communication raised the issue of whether references had been checked before the complainant was rehired. It fairly quickly emerged they had been and that was the end of the matter. The complainant did not point to any factual or methodological flaw in the JARB's analysis.

8. As noted in a recent decision (Judgment 3163, under 8), the Tribunal has set its face against assessing the exercise of a discretionary power, such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked some material fact or reached a clearly wrong conclusion. To impugn the exercise of a discretionary decision-making power by reference to,

and based on, the factual matrix in which the decision was made, a complainant must demonstrate something more than other decisions might reasonably have been made on the known facts.

9. In the present case, the complainant has not established that the non-renewal of his contract was for any reason other than the reason advanced by IOM. Nor has he established that any procedural irregularity or other deficiency tainted the decision.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet